Supreme Court, U.S.
FILED
JUL 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-1984

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

SAN FRANCISCO POLICE OFFICERS ASSOCIATION, LYNNE A. TORRES, LILLIAN CHAI MATTOCH, and HENRY KIRK,
Petitioners,

VS.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation; CIVIL SERVICE COMMISSION; LOUIS HOP LEE, REVEREND DR. HOWARD S. GLOYD, CARLOTA TEXIDOR DEL PORTILLO, GENEVIEVE W. POWELL, and A. LEE MUNSON,
Respondents.

RESPONSE OF INTERVENORS TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES R. WHEATON
ARMANDO M. MENOCAL, III*
PUBLIC ADVOCATES, INC.
1535 Mission Street
San Francisco, CA 94103
Telephone: (415) 431-7430
Attorneys for Officers for Justice, et al.

* *Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

BEST AVAILABLE COPY

29 pp

QUESTIONS PRESENTED

1. Does Title VII (42 U.S.C. § 2000e *et. seq.*) mandate relief for unidentified non-minority workers following abandonment of an anonymous, potential promotion eligibility list found to be invalid under Title VII and a Consent Decree?

2. When the relief originally requested by plaintiffs is no longer possible, must an appeals court finding in plaintiffs' favor grant alternative relief first raised by plaintiffs on the second rehearing of the appeal?

THE PARTIES

Officers for Justice (OFJ), the National Association for the Advancement of Colored People, Western Region (NAACP), Chinese for Affirmative Action, the National Organization for Women, and the League of United Latin American Citizens are respondent-intervenors in this case. Officers for Justice is a recognized bargaining unit for San Francisco police officers, composed primarily of minority and women officers. The NAACP is a national organization devoted to the promotion of equal rights for all persons. Chinese for Affirmative Action is an organization created to work for equal opportunity for Americans of Chinese heritage. The National Organization for Women works for the improvement of the status of women in American society. The League of United Latin American Citizens is a group working to promote the interests of Latin American citizens. These organizations (hereinafter referred to collectively as OFJ) were the organizational plaintiffs in the underlying suit in this action, *Officers for Justice v. Civil Service Commission*, 473 F.Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). Collectively they act as class representatives for all women and minority applicants and employees in the San Francisco Police Department.[1]

Petitioners are the San Francisco Police Officers Association, Lynne A. Torres, Lillian Chai Mattoch, and Henry Kirk. The Association is a labor organization representing most police officers in their employer-employee relations with the City of San Francisco. Petitioner Torres is a Hispanic woman who was promoted from the revised promotional eligibility list described herein. Petitioner Mattoch is an Asian woman who was promoted

---

[1] It is only through an odd twist of procedure that Petitioners came to be the plaintiffs in this case. In order to avoid the federal court, Petitioners originally filed this case in state court and avoided stating any federal claims in their complaint under which removal to federal court would be proper. Nonetheless removal was accomplished under the Civil Rights Removal Act, 28 U.S.C. § 1443. OFJ was granted full party intervenor status of right to defend the City's actions, taken under a Federal Consent Decree.

from the revised promotional eligibility list described herein. Petitioner Henry Kirk is a black male police officer.

Respondents are the City and County of San Francisco, a municipal corporation; its Civil Service Commission; and Commissioners Louis Hop Lee, Reverend Dr. Howard S. Gloyd, Carlota Texidor Del Portillo, Genevieve W. Powell, and A. Lee Munson.

The California Organization of Police and Sheriffs participated as Amicus Curiae on behalf of the Petitioners. The Department of Justice of the United States participated as Amicus Curiae on behalf of the Respondents.

TABLE OF CONTENTS

	Page
Questions Presented	i
The Parties	ii
Opinions Below	1
Jurisdiction	2
Statutes Involved	3
Statement of the Case	4
Argument	9
A. Reasons For Denying the Writ	9
1. Petitioners do not have standing to represent the claims of the non-minority victims of the alleged "reverse discrimination"	9
2. The case is moot	11
3. No individual has the right to be appointed as the result of an unvalidated discriminatory test	13
4. The decision of the Ninth Circuit does not conflict with the decisions of this Court or with those of other circuits	17
5. The questions of relief raised by this case involve narrow questions of the interpretation of a particular Consent Decree. Any decision by this Court would necessarily rest on these narrow grounds and would fail to resolve any important issues involving the application of Title VII	20
B. In the Alternative, If the Writ is Granted, the Court Should Vacate the Ninth Circuit's Opinion as Moot	21
Conclusion	22

TABLE OF AUTHORITIES

Cases

Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 13, 15, 17, 19
Allee v. Medrano, 416 U.S. 802 (1974) 10
Allen v. Wright, 468 U.S. 737 (1984) 10
Baker v. Carr, 369 U.S. 186 (1962) 9
Bushey v. New York State Civil Service Commission, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1986) 16
Cygnar v. City of Chicago, 865 F.2d 827 (7th Cir. 1989) 19, 20
Dougherty v. Barry, 869 F.2d 605 (D.C. Cir. 1989) 19
Firefighters v. Stotts, 467 U.S. 561 (1984) 3, 8, 12
Flast v. Cohen, 392 U.S. 83 (1968) 9
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 17, 18, 19
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 13
Hall v. Beals, 396 U.S. 45 (1969) 11, 21, 22
Hormel v. Helvering, 312 U.S. 552 (1941) 13
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 12, 17, 18, 19
Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616 (1987) 14
Lilly v. City of Beckley, West Virginia, 797 F.2d 191 (4th Cir. 1986) 19, 20
Linda R.S. v. Richard D., 410 U.S. 614 (1973) 9, 10
Local 93, International Association of Firefighters v. Cleveland, 478 U.S. 501 (1986) 20, 21
Mills v. Green, 159 U.S. 651 (1895) 11, 21
Officers for Justice v. Civil Service Commission, 473 F.Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983) ..... ii, 4
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 13
Singleton v. Wulff, 428 U.S. 106 (1976) 13

TABLE OF AUTHORITIES

CASES

	Page
Thornburgh v. American College of Obstetricians, 476 U.S. 747 (1986)	13
United Steelworkers of America v. Weber, 443 U.S. 193 (1979)	7, 14
University of Texas v. Camenisch, 451 U.S. 390 (1981)	21
Warth v. Seldin, 422 U.S. 490 (1975)	11
Wilmington Firefighters v. City of Wilmington, 632 F.Supp. 1177 (Del. 1986), *dismissed as moot*, 824 F.2d 262 (3rd Cir. 1987)	20
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)	3, 11, 12, 14

Statutes and Other Authorities

28 U.S.C.:	
Section 1254(1)	2
Section 1443	ii
42 U.S.C.:	
Section 2000e	i
Section 2000e-2(a)	3
Section 2000e-5(g)	3
29 C.F.R.:	
Section 1607	4
Section 1607.6A	5, 15
Section 1607.3B	13, 16
Section 1607.5G	16
Federal Register:	
44 Fed. Reg. 11996, 120001	5, 15
44 Fed. Reg. 11996, 120003-4	13, 16
43 Fed. Reg. 38290, 38291	16
Federal Rules of Civil Procedure:	
Rule 23(a)(3)	10

No. 88-1984

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

SAN FRANCISCO POLICE OFFICERS ASSOCIATION,
LYNNE A. TORRES, LILLIAN CHAI MATTOCH,
and HENRY KIRK,
Petitioners,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation;
CIVIL SERVICE COMMISSION; LOUIS HOP LEE,
REVEREND DR. HOWARD S. GLOYD,
CARLOTA TEXIDOR DEL PORTILLO,
GENEVIEVE W. POWELL, and A. LEE MUNSON,
Respondents.

RESPONSE OF INTERVENORS TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Intervenor-Respondents Officers for Justice respectfully ask that Petitioners' request for a Writ of Certiorari be denied. In the alternative, Officers for Justice prays that this Court grant the petition and vacate the opinion below as moot.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit is reported at 869 F.2d 782 (9th Cir. 1988). The order denying

Petitioners' Petition for Rehearing and Rejecting the Suggestion for Rehearing *en banc* is not reported.

Two previous opinions of the Court of Appeals in the same proceeding are reported at 842 F.2d 1126 (9th Cir. 1988) and 812 F.2d 1126 (9th Cir. 1987). The Court's order vacating its 1987 opinion is not reported. The memorandum decisions of the District Court for the Northern District of California are reported at 621 F.Supp. 1221 (N.D. Cal. 1985) and 621 F.Supp. 1225 (N.D. Cal. 1985). The order of the United States District Court approving the Consent Decree and the Consent Decree are reported at 473 F.Supp. 801 (N.D. Cal. 1979).

JURISDICTION

Petitioners invoke the jurisdiction of the Court to review the Judgment of the Ninth Circuit under 28 U.S.C. § 1254(1). Two factors, however, deprive the Court of jurisdiction over this case. First, the parties before the court lack standing to represent the claims of the alleged white male victims of "reverse discrimination." Petitioners Torres and Mattoch have received the promotions they sought. Petitioner Henry Kirk, a black male, by definition cannot be a victim of the alleged discrimination against non-minority candidates for promotion. This case has not been certified as a class action, and none of the petitioners can claim to represent the group of white males allegedly injured as a result of the reweighting of the examinations.

This case is also moot. The only relief requested by Petitioners in the trial court and in the first two hearings before the Ninth Circuit was injunctive and declaratory relief to stop the City from using the promotional eligibility list created from the reweighted examinations. Petitioners' claims for individualized relief should not be heard, as petitioners' failure to raise these claims in the trial court and in the initial appeal has necessarily precluded any defense to these claims, in pleading as well as at trial, by Respondents.

The City has already made its appointments from the reweighted list, and has agreed not to reweight any future test results. Under the principles governing relief in Title VII cases,

the current appointees cannot be removed from their positions. *Wygant v. Jackson Board of Education,* 476 U.S. 267, 282 (1986); *Firefighters v. Stotts,* 467 U.S. 561, 579 (1984). The issue of injunctive relief, the only issue properly before this court, is therefore moot.

STATUTES INVOLVED

42 U.S.C. § 2000e-2(a). Employer practices.

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-5(g). Injunction; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated

against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT OF THE CASE

This case actually began in 1973 when Officers for Justice brought suit alleging discrimination based on race and sex in the San Francisco Police Department. Following findings of deliberate racial and sexual discrimination in hiring and promotions, the suit was settled by a Consent Decree on March 30, 1979. *Officers for Justice v. Civil Service Commission,* 473 F. Supp. 801 (N.D. Cal. 1979), *aff'd,* 688 F.2d 615 (9th Cir. 1982), *cert. denied,* 459 U.S. 1217 (1983). The Consent Decree was signed by the City of San Francisco, Officers for Justice (representing class members, minority and female police officers and applicants), the San Francisco Police Officers Association, and the United States.

The decree requires the City to employ good faith efforts to achieve particular goals for the employment and promotion of women and minorities in the police department. It prohibits the use of methods of selection that have an adverse impact on women and minorities unless the City proves they are valid under the *Uniform Guidelines on Employee Selection Procedures,* 29 C.F.R. § 1607.

In 1983 the City gave examinations for promotion to Q-35 Assistant Inspector and Q-50 Sergeant. The examinations were in three parts: a multiple choice test measuring technical knowledge and problem solving; a writing skills test; and an oral test measuring ability to communicate, interpersonal qualities, and supervisory abilities. The Police Department's Consent Decree Division Coordinator and the test consultant advised that no weights be set for the examination components until after the

examination had been given and the results analyzed.[2] However, after the multiple choice section of the examination had been given, but before the other two components, the Police Officers Association lobbied for certain weights to be set for all exam components in the middle of the examination administration. The Consent Decree Coordinator, the District Court's Consent Decree Auditor-Monitor, the test consultant, and all parties to the Consent Decree other than POA objected to the proposed weighting on the grounds that it was unnecessary and premature, and would almost certainly result in preferential selection of white males for promotion. The Civil Service Commission nevertheless adopted the POA's proposed weighting system.

The examinations were then completed and the results tabulated by race and sex without revealing the identities of the candidates as listed.[3] Using the component weightings requested by POA, the Q-35 examination had an adverse impact on women and both examinations had a substantial adverse impact on minorities. Rather than attempt to validate a set of testing weights that had a proven adverse impact on minorities and women, the City chose to revise its selection procedure, as permitted by the *Uniform Guidelines*. *See* 29 C.F.R. § 1607.6A (1986); Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11996, 12001, Question and Answer n. 31 (1979).

Because the City determined not to use the test results reflecting adverse impact, it never carried out the screening needed to determine which individuals would actually receive promotions

---

[2] This is a standard practice in unique examinations devised for one-time use, in order that errors in test development—inaccurate answers, ambiguous instructions or questions, and exercises that do not effectively screen or differentiate candidates—can be resolved *before* putting weights on the as yet unfinalized components. Moreover, every examination composed of different parts will have a universe of possible weightings, all defensibly valid as predictors of performance.

[3] This anonymous tabulation is required by the Consent Decree. *See* Consent Decree, paragraph 15, 473 F.Supp. 801 at 820.

based upon those test results.[4] No one has ever identified the individuals who might have received appointments as Sergeants or Assistant Inspectors had the City decided to make its appointments from a list based upon the original weights. Petitioners' motion to obtain the names attached to the original rankings was denied in March of this year. Petitioners filed that motion only after the filing of their second petition for rehearing in the Ninth Circuit—the petition which first raised the issue of individualized relief. While POA asserts that it represents the interests of 51 unnamed individuals who allegedly lost their promotions when the examination components were reweighted, it must be noted that no one can even claim to know that there are 51 such individuals, or who they are.

Using a new formula to weight the results of the different test components, the Civil Service Commission created a new list which eliminated adverse impact against women and minorities. The City Attorney explicitly stated that the new weights were no less valid for the examinations than the original weights. Ultimately 120 persons were appointed as Sergeants and Assistant Inspectors. Of this group 76 were white males, 28 were minority group members, and 16 were women. The percentage of white males promoted from this list was almost exactly equal to the percentage of white males in the applicant group. Petitioners have never claimed that the examination, as reweighted, was in and of itself unfair to white males. It was not. They have only challenged the process used to arrive at the new weightings.

The POA originally challenged the City's adoption of the revised weighting in an action filed in state court, on the grounds that the changes made violated the time limit for rehearing set by

---

[4] Applicants who take an exam frequently do not receive appointment due to after-occurring events such as disability or retirement, or because of ineligibility due to discipline, or because the putative eligible list has to be revised after publication, following correction of errors and protests and appeals by test applicants under Civil Service procedures and rules. Accordingly, even when published with names, such a list is only denominated as "tentative," pending further review. The list at issue here never even reached the "tentative" stage.

the San Francisco Civil Service Rules. The complaint sought only injunctive and declaratory relief to prevent the city from using the newly reweighted exam results.

The case was moved to Federal court, and following preliminary proceedings, Chief Judge Peckham ruled on March 14, 1985, that the Supremacy Clause of the United States Constitution allowed suspension of the Civil Service Rule when required for compliance with Title VII and the Consent Decree. *City and County of San Francisco v. San Francisco Police Officers Association,* 621 F.Supp. 1225 (N.D. Cal. 1985).

Following trial, Judge Peckham issued a second opinion holding that the reweighting procedure constituted a valid affirmative action plan under the standards of *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), and ordered that the long delayed apppointments be made. *San Francisco Police Officers Association v. City and County of San Francisco,* 621 F.Supp. 1221 (N.D. Cal. 1985). Judge Peckham dissolved a preliminary injunction. The Ninth Circuit Court of Appeals and this Court refused to grant stays pending appeal. In March, 1986, the City completed the administrative and procedural work and made the appointments. The exam and the list then expired under Civil Service Rules.

On appeal the Ninth Circuit initially ruled on March 12, 1987 that the City had engaged in impermissible, race-conscious action which unnecessarily trammeled the interests of non-minority police officers when it reweighed the examination components. *San Francisco Police Officers Association v. San Francisco,* 812 F.2d 1125, 1131 (9th Cir. 1987). However, the Ninth Circuit also ruled that the initial weights were invalid, due to their adverse impact on minorities and women, and that the decision not to use these weights was required by the Consent Decree. 812 F.2d at 1130 and n.6. Finding that the City intended to weigh future promotional examinations in the same manner challenged there, the Court initially concluded that the POA's appeal was not moot. 812 F.2d at 1128. The case was remanded to the District Court for development of a valid selection device for promotions.

Both parties petitioned for rehearing. By an Order dated August 17, 1987, the Ninth Circuit denied the petitions for rehearing and suggestion for rehearing *en banc*. By the same Order the Circuit Judges vacated their first opinion and informed the parties of their intention to file an amended decision, reversing the District Court and permitting those officers already promoted to remain in their positions. The vote of the panel judges, the outcome and the relief were set out, but no reasoning or opinion accompanied the Order.

The promised decision was never issued. Instead, in March 1988, the Court issued a second opinion dismissing the appeal as moot. *San Francisco Police Officers Association v. City and County of San Francisco,* 842 F.2d 1126 (9th Cir. 1988). The Court concluded:

> (1) that it would be inequitable to remove those police officers who were promoted pursuant to the revised weighting scheme, citing *Firefighters v. Stotts,* 467 U.S. 561, 579 (1984);
>
> (2) that no individual could claim a position as the result of the original weighting scheme, which was never validated as required by the Consent Decree;
>
> (3) that as a result of a supplemental order of the District Court entered on October 26, 1986, the City stipulated, *inter alia*, that it would not again reweight an examination after scoring standards had been set and the examination administered.

Petitioners then filed another Petition for Rehearing and Suggestion for Rehearing *en banc*, suggesting for the first time in the case the possibility of individualized relief such as back pay or promotional rights. The Ninth Circuit's third and final opinion, in March, 1989, properly rejected this suggestion. *San Francisco Police Officers' Association v. City and County of San Francisco,* 869 F.2d 1182 (9th Cir. 1989). The Court held again that the test as originally weighted was not in compliance with the Consent Decree, and that therefore no one had acquired any rights as a result of that test. While the reweighting procedure was once again held to be invalid, the Court again recognized that no relief

(other than declaratory relief) was appropriate: the City had agreed not to reweight any test scores in the future, and the officers promoted from the revised list could not fairly be ousted from their jobs. Back pay had not been requested in the original complaint and could not be granted after a request so late in the proceedings. The Court reversed the District Court's opinion but did not remand, in light of the absence of an appropriate remedy.[5]

ARGUMENT

A. Reasons for Denying the Writ

1. Petitioners do not have standing to represent the claims of the non-minority victims of the alleged "reverse discrimination."

Petitioners' claims are based on the charge that the City of San Francisco engaged in illegal "reverse discrimination" by reweighting the results of the Q-35 and Q-50 promotional examinations to eliminate the adverse impact on women and minority candidates. However, none of the parties in this case can claim to be one of those harmed by this alleged discrimination or to represent those harmed.

In order to have standing to pursue a claim, "plaintiffs must allege some threatened or actual injury resulting from the putative illegal action[.]" *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). *See also Baker v. Carr*, 369 U.S. 186, 204 (1962); *Flast v. Cohen*, 392 U.S. 83, 101 (1968). None of the individual plaintiffs in this case was injured as a result of the supposed "reverse discrimination." Petitioners Torres and Mattoch were both promoted as a result of the City's use of the revised eligibility list. Petitioner Kirk's scores on the examinations were apparently so low that it is unlikely he would have been promoted using any set of examination weights.

---

[5] The Court of Appeals did invite an attorneys' fee application in that Court from the POA. This was odd, as the POA had never requested fees. Moreover, the POA had had fees awarded *against* it in the trial based, in part, on its violations of the Consent Decree, in the manner in which it prosecuted this case, quite apart from the Title VII substance.

Plaintiffs must also show a sufficient nexus between the injuries alleged and the alleged violation. *Allen v. Wright*, 468 U.S. 737, 757-758 (1984); *Linda R.S. v. Richard D.*, 410 U.S. at 618. The injury must be one that will be redressed by a favorable decision. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42 (1976). In this case, all three individual petitioners are members of minority groups: Lynne Torres is a Hispanic woman, Lillian Chai Mattoch an Asian woman, and Henry Kirk a black man. It is hard to understand how they can claim to be victims of what Petitioners characterize as discrimination in *favor* of minorities and women. Even if plaintiffs had alleged some cognizable injury, related in some way to defendants' actions, they could not link that injury to *employment discrimination*, the alleged violation.

The individual Petitioners in this case have no claim to represent those who were supposedly harmed. This case was not filed as a class action. Petitioners have never sought to certify the action as a class action or to assert any claims on behalf of anyone but themselves. Moreover, all of the petitioners are particularly ill suited to act as representatives of the alleged victims. Lillian Mattoch and Lynne Torres are both minority women who were promoted from the revised list. They cannot possibly assert claims for the individuals who were not promoted, since they can never meet the standards of typicality. Federal Rules of Civil Procedure 23(a)(3). The remaining named plaintiff, Henry Kirk, is also a member of a minority group. As noted above, it is unlikely that his place on the original list would have earned him promotion. He, too, would be a poor representative for the white males who placed well on the original list. Lacking standing on their own behalf, Petitioners cannot acquire standing by asserting the claims of others. *Allee v. Medrano*, 416 U.S. 802, 828-829 (1974) (Burger, C.J., concurring in the result and dissenting in part).

The Police Officers Association also lacks standing to pursue the claims of the alleged victims of discrimination. Defendants' actions have not harmed the POA as an organization. The POA can only claim standing on the basis of injury to its members. It is true that the Police Officers Association, as a union representing some San Francisco police officers, may count among its mem-

bers some or all of those unidentified white males who might have been promoted had the original rankings been used. As an organizational plaintiff, however, POA cannot ask for individualized relief, such as back pay, that will not benefit its members as a group. They can only request injunctive or declaratory relief—relief which is no longer possible in this case. *Warth v. Seldin*, 422 U.S. 490, 515-516 (1975).

Moreover, the membership of POA includes both those individuals who were promoted from the revised list and a large number of officers who seek the chance to compete for the promotions which the POA seeks to reserve for the alleged victims of discrimination. Some of these officers are already preparing for the new set of promotional examinations that the City plans to administer later this year. The relief the POA seeks will benefit some of their members and do direct harm to others. Just as the individual Petitioners could not serve as class representatives, the POA cannot act as a class representative due to these conflicts of interest among its members. The POA is in an irreconcilably conflicted position, trying to represent a small number of members who would understandably be happy to win promotions in this lawsuit to the detriment of the other officers on the force. The POA has no power or right to attempt to adjudicate someone else's legal claims in order to keep its own lawsuit alive.

2. The case is moot.

When a court is unable to grant any effective form of relief, the case is moot. *Mills v. Green*, 159 U.S. 651, 653 (1895); *Hall v. Beals*, 396 U.S. 45, 48 (1969). In the present case, Petitioners' claim for injunctive relief cannot be granted. The City has already made appointments from the revised list. As the Ninth Circuit recognized, those persons appointed pursuant to the reweighting scheme are innocent of wrongdoing and it would be inequitable to penalize them by removing them from their positions. This Court has consistently held that even those workers who hold their jobs as the result of the discriminatory practices of their employers cannot be removed from their positions in order to provide relief to the victims of the discrimination. In *Wygant v. Jackson Board of Education*, for example, this Court found that layoffs were not

permissible as part of the relief offered to plaintiffs, because they imposed too much of a burden on particular individuals. 476 U.S. 267, 282 (1986). *See also Firefighters v. Stotts*, 467 U.S. 561, 579 (1984). Principles of equity govern the decision of what relief is appropriate. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 375-376 (1977). In this case, it would be unfair to both the individuals involved and the City of San Francisco, as it attempts to maintain an effective police force, to remove those Sergeants and Assistant Inspectors who have already been appointed. What has been done cannot be undone; the use of the reweighting scheme cannot be enjoined when it has already been used.

An injunction to prohibit future reweightings of examination components would be pointless. The District Court has issued a Stipulated Supplemental Order, dated October 27, 1986, which reformed in its entirety the creation, administration and scoring of promotional examinations. That revised procedure necessarily prohibits the City from setting scoring standards before a test and changing them after the test has been given. The City stipulated to the entry of that Order and is bound by it. Another injunction saying the same thing would have no effect. Moreover, the City is in the midst of preparing a new set of examinations for other positions to be administered later this year.

This Court should not consider Petitioners' claims for other forms of relief, such as back pay or rights to future promotions. Throughout most of its history, this case has proceeded solely on theories related to prohibitory injunctive relief. The original complaint was framed solely in terms of invalidating the reweighing decision. All proceedings in the District Court focused solely on this theory and this relief. Indeed, the trial itself, with plaintiffs as the moving parties controlling the litigation, was devoted solely to whether the reweighting was permissible. Plaintiffs have conducted *no* discovery, presented *no* evidence, and offered *no* argument to support theories that specific, unnamed individuals are entitled to individualized forms of relief. Defendants have had no opportunity to present evidence relating to these new theories of relief. This record is utterly devoid of any evidence or material even to calculate what the damages might have been or who the

individuals are. If plaintiffs desired such relief it was incumbent upon them to put it in the record as part of their case. Up until the second rehearing before the Ninth Circuit, this case always proceeded on the basis that plaintiffs were seeking affirmative prospective relief directed to altering defendants' conduct.

Appellate courts will ordinarily not consider issues not raised below. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Regents of University of California v. Bakke*, 438 U.S. 265, 283 (1978); *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 821-822 (1986) (O'Connor, J., dissenting). The decision of whether to consider a question not raised below is left to the discretion of the Courts of Appeals, to be exercised in consideration of serving the ends of justice. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). In this case, the Ninth Circuit properly exercised its discretion. Consideration of Petitioners' belated claims for individualized relief would be unfair. This Court should similarly refuse to hear these claims. As no injunctive relief can be granted and other forms of relief were not requested below, this case is moot.

3. No individual has the right to be appointed as the result of an unvalidated discriminatory test.

The persons who scored highest on the examinations prior to the reweighting have no rightful claim of being victims of employment discrimination.[6] The unidentified 51 for whom POA now

---

[6] Under well settled Title VII case law, an examination with adverse impact is not merely discriminatory but *presumptively invalid*. Only if validity is established can that presumption be overcome. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Validity of the original weights has never been established, or even alleged by the POA. It only alleged the reweighting was unlawful. Moreover, discriminatory weights are disfavored and unlawful where a second set of weights is available that would be equally valid but without adverse impact. 29 C.F.R. § 1607.3B (1988); 44 Fed. Reg. 11996, 12003-04, Questions and Answers Nos. 50-51 (1979). The City has admitted the second weights were equally valid. Therefore, under Title VII and the *Uniform Guidelines*, the validity of the original weights is irrelevant and the second weights *must* be used.

purports to litigate held their supposed positions only as the result of a weighting system that has consistently been held to be invalid under the Consent Decree and Title VII by both the District Court and the Court of Appeals. Nonminorities do not have a legally protected interest in promotions which could only be made pursuant to discriminatory employment practices. This Court has held that it is permissible for employers to take affirmative action to correct traditional patterns of discrimination. *United Steelworkers v. Weber*, 443 U.S. 193, 204 (1979). It is impossible to aid minorities in this way without adversely affecting the previous expectations of non-minorities. This Court recognized that fact in *Johnson v. Transportation Agency of Santa Clara County*, holding that denying a promotion to a white male as part of a legitimate affirmative action plan does not violate Title VII. 480 U.S. 616 (1987). When nonminority expectations are based upon a perpetuation of discriminatory practices, a reduction in those expectations does not result in a violation of Title VII. This Court has noted that where layoffs are not involved, innocent individuals may have to bear the burden of achieving equal employment opportunity. "Denial of a future employment opportunity is not as intrusive as loss of an existing job." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 282-283 (1986).

Furthermore, no individual petitioner can show that he or she would have been appointed but for the reweighting of the eligibility test. The names attached to the original rankings have never been released. Even if they had been, further work would have been necessary to determine who would have received the appointments from that list: applicants must be screened to determine whether they meet the other requirements for promotion. Mattoch and Torres have been promoted, and so certainly are not members of the group of people harmed by the reweighting. Petitioner Kirk has no way of knowing whether he would have been promoted using the original weights, and has stated in deposition that he does not know.

At best, Petitioners are in the posture of the plaintiff in *Johnson, supra*. In rejecting his claim, this Court pointed out:

> In addition, petitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classi-

> fied as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner. Furthermore, while the petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions.

480 U.S. 616, 638.

In *Albemarle Paper Co. v. Moody* 422 U.S. 405, 418 (1975) this Court stated: "Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " (Quoting *Louisiana v. United States* 380 U.S. 145, 154 (1965)). The City's decision to withdraw potential eligibility lists based on invalid weights was consistent with the Supreme court's directive in *Albemarle Paper*. No person can claim to be a victim or to deserve a remedy as a result of not being promoted through a discriminatory examination process. Because the unidentified white males whose interests appellants claim to represent could only have been appointed as the result of an invalid discriminatory exam, they cannot claim to be victims of employment discrimination. Accordingly, they are entitled to no remedies in this action.

The Consent Decree specifically forbids the City from using tests or other selection criteria that demonstrate an adverse impact "unless and until" the City proves the procedures are valid under the *Uniform Guidelines*. Consent Decree, paragraph 4, 473 F.Supp. 801 at 812. Rather than validate a test that had a proven adverse impact on minorities and women, the City chose to revise its testing procedure. The *Uniform Guidelines* permit employers to use different selection procedures that do not have an adverse impact on minorities and women as an alternative to validating challenged test procedures. 29 C.F.R. § 1607.6A (1988); Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11996, 12001, Question and Answer n. 31 (1979). Furthermore, the *Uniform Guidelines* required the

City to discard the challenged procedure and to consider alternative selection procedures when faced with a testing device demonstrating adverse impact. 28 C.F.R. 1607.3B (1988). *See, Bushey v. New York Civil Service Commission*, 733 F.2d 220, 226-228 (2nd Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985). The rescoring scheme upheld in *Bushey* was explicitly based on race, adjusting the raw scores of minority candidates upwards. By contrast, the reweighting scheme used by San Francisco treated all applicants alike, regardless of race or sex.

In examining alternatives, the employer should also examine alternative methods of using a selection procedure. 29 C.F.R. § 1607.5G (1988); 43 Fed. Reg. 38290, 38291 (1979). The alternative selection procedure should be used when it has less adverse impact and when the evidence demonstrates that its validity is substantially the same or greater than the challenged procedure. 29 C.F.R. § 1607.3B (1988); 44 Fed. Reg. 11996, 12003-04, Questions and Answers Nos. 50-51 (1979).

In this case the POA has never challenged the job-relatedness of the components as reweighted. The alternative weighing procedure eliminated the test's adverse impact. Under the *Uniform Guidelines*, the City was prohibited from validating the tests, because an alternative selection procedure existed that was equally job-related but had no adverse impact.

Petitioners have not challenged the reweighted test as being discriminatory in and of itself. Indeed, the percentage of white males in the group of those appointed from the reweighted list is almost exactly equal to the percentage of white males in the applicant group. It is only in comparison to the original list that white males are disadvantaged. Given that that list has been held invalid by both courts below, there is no reason for that comparison to be made. Thus Petitioners cannot legitimately contend that employees who would have received promotions had the original weighting scheme been used are victims of unlawful employment discrimination entitled to any remedy from this Court.

4. The decision of the Ninth Circuit does not conflict with the decisions of this Court or with those of other circuits.

Petitioners cite *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) to support the proposition that all victims of Title VII employment discrimination must be granted relief, claiming that the only difference between the plaintiffs in those cases and the Petitioners here is that the "discriminatees" in this case are non-minorities. In fact, the holding in *Albemarle Paper* supports the Ninth Circuit's refusal to grant individualized relief. The other cases cited have little bearing on the issues in this case, and do not dictate another result.

In *Albemarle Paper*, the Court held that given a finding of unlawful discrimination, an award of back pay should be denied only for reasons which, if applied generally, would not frustrate the central purposes of the employment discrimination statutes. 422 U.S. at 421. In that case, as here, one reason for the district court's refusal to award back pay was the plaintiffs' failure to request it in their original complaint. The issue was remanded to the district court for a decision on the factual issue of whether the plaintiffs' lateness in raising their back pay claims had prejudiced the defendants. If the district court found that it had, they could refuse to award back pay.

In this case, Petitioners' failure to raise their claims for individualized relief clearly prejudiced Respondents by denying them the chance to build a case against these claims.[7] To deny relief that plaintiffs fail to request will surely not defeat the purposes of Title

---

[7] Not only have defendants been unable to defend against the damages claim, but Petitioners now come to the Supreme Court to demand entitlement to relief without affording Respondents the opportunity to present evidence in the trial court or any legal argument in the trial court or in the Court of Appeals. Defendants have not had the opportunity to present any defenses which might have been available had Petitioners raised the claim for damages earlier in the proceedings. For example, the Answer is devoid of procedural defenses to damages simply because the Complaint did not ask for damages. In effect, the plaintiffs ask to redraft

VII; it simply asks that Title VII plaintiffs, like any plaintiffs, let the court know what they hope to achieve in their lawsuit. In addition, there are other reasons here which support the denial of relief. As described above, Petitioners had no right to the promotions made, and so have no right to relief.

In *Franks v. Bowman* this Court held that discrimination victims may be awarded retroactive seniority status as part of their relief. 424 U.S. at 779. The Court also noted that district courts are given broad discretion to fashion remedies for successful Title VII litigants. 424 U.S. at 770. This discretion may cut both ways, however. In the present case, principles of equity supported the denial of relief. In addition, by reiterating that the fashioning of a remedy is generally left to the district courts, the Court did not deny the Courts of Appeals the power that the Ninth Circuit has exercised here, to decide as a matter of law that no relief may fairly be granted.

Similarly, the holding in *Teamsters* does not apply to the present case. The Court held in *Teamsters* that a finding of discrimination creates a presumption of relief for members of the "affected class" of discriminatees, placing the burden on the employer to show that any particular class member was not a victim of discrimination. 431 U.S. at 362. In this case, however, the alleged victims had no right to the promotions they claim, and so have no right to "make-whole" relief based on the assumption that they deserved these promotions. Furthermore, none of the white male victims of the alleged discrimination are before the court, nor is there any party in this case who can claim to represent this group. The Court simply has no power to grant relief to people who are not parties to the case. Finally, even if these men were parties in this case, their failure to request individual relief in a timely manner would block them from claiming it at this stage in the proceedings. The *Teamsters* presumption of relief simply does not apply.

Petitioners claim that if they had been minorities, they would have received relief. In reality, the weakness of their legal claims

---

their complaint after the case is over, without giving defendants a chance a plead in response.

and the procedural problems presented by this case would have blocked relief no matter what the race or sex of the plaintiffs. *Albemarle, Franks v. Bowman*, and *Teamsters* simply do not speak to the many weaknesses in Petitioners' case.

Petitioners' citations to the cases of other Circuits are also inapposite. *Dougherty v. Barry*, 869 F.2d 605 (D.C. Cir. 1989), *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989) and *Lilly v. City of Beckley, West Virginia*, 797 F.2d 191 (4th Cir. 1986) are all cases which apply Title VII law to instances of "reverse discrimination," in which white males were harmed. None of them have any further application to the legal and procedural difficulties in this case.

In *Dougherty*, white firefighters were passed over for promotion to the position of deputy fire chief on the basis of their race. Judge Ginsburg applied the holding of *Teamsters* and found that the city of Washington had the burden of proof to show that particular individuals would not have been promoted in the absence of discrimination and therefore should not receive relief. There was no question as to the proper parties being before the court—eight white firefighters who were denied promotion had brought the suit. Plaintiffs had requested monetary relief, so mootness was not a problem. Finally, the challenged promotions were not required by the Fire Department's affirmative action plan. Unlike the Petitioners in this case, plaintiffs had a cognizable legal argument regarding the positions in question.

In *Cygnar*, thirteen white Chicago police officers were transferred from their positions in the Office of Municipal Investigation because of their race. The Seventh Circuit Court of Appeals upheld the district court's award of monetary relief, holding that race based personnel decisions which were not guided by a careful statistical analysis could not constitute a valid affirmative action plan. In *Lilly*, as in *Cygnar*, Beckley's informal affirmative action plan was not sufficient justification for its discrimination against the white male plaintiff in hiring for the police department. By contrast, in the present case, San Francisco was required by the Consent Decree to discard the test results as originally weighted. The reweighting was narrowly tailored to eliminate a proven adverse impact on minorities and women. And again, the plain-

tiffs in *Cygnar* and *Lilly* faced none of the procedural difficulties of standing and mootness presented in this case.

Unable to find Supreme Court precedent or decisions in other Circuits which conflict with the Ninth Circuit's holding, Petitioners resort to citing a District Court case, *Wilmington Firefighters v. City of Wilmington,* 632 F.Supp. 1177 (Del. 1986), *dismissed as moot*, 824 F.2d 262 (3rd Cir. 1987). The facts in *Wilmington* are similar to what happened in this case; the City of Wilmington reweighted examination components in a promotional examination in order to comply with a Title VII Consent Decree that forbad the use of examinations with a disparate impact on minorities. The District Court held that Wilmington had to go through the procedure contemplated by the Consent Decree in order to discard the initial test results. Wilmington would have to wait until the test results were challenged in court and attempt to defend them before the city could create a new scoring system. 632 F.Supp. at 1189. The court relied on testimony in the underlying discrimination case to support its interpretion of the Consent Decree.

In the present case, the Consent Decree did not contemplate further litigation to achieve the hiring and promotional goals set for the San Francisco police department. Both the District Court and the Ninth Circuit have agreed that the Consent Decree *required* that the City not use the initial test results. The Consent Decree in this case specifically incorporates the standards of the *Uniform Guidelines*, and, as shown above, the City's actions were permissible under these standards. Petitioners cannot use the interpretation of a completely different Consent Decree in a completely different case to govern the interpretation of San Francisco's own Consent Decree.

5. The questions of relief raised by this case involve narrow questions of the interpretation of a particular Consent Decree. Any decision by this Court would necessarily rest on these narrow grounds and would fail to resolve any important issues involving the application of Title VII.

This Court has granted broad discretion to District Courts to approve consent decrees in Title VII cases. In *Local 93, Int'l*

Ass'n. of Firefighters v. Cleveland, 478 U.S. 501 (1986), the Court held that Title VII permits consent decrees granting race-conscious relief in promotions as well as hiring. The Court strongly approved voluntary settlements of discrimination claims, and gave district courts broad power to approve relief even beyond what they could order after trial.

In this case, Petitioners' claim to anything other than injunctive relief (which, for the reasons noted above, it is no longer possible to grant) must rest on an interpretation of the Consent Decree which would have allowed the City to use the original weightings for the promotional examination. Petitioners themselves argue that the Consent Decree, not Title VII, required the City to defend the challenged test results before agreeing to change the weights of the test components (Petition for Cert., p. 15). Any decision regarding Petitioners' right to relief must be based on an interpretation of the Consent Decree. Such a decision would serve to resolve only the case at hand, and would not illuminate any broad questions in employment discrimination law.

B. In the Alternative, if the Writ is Granted, the Court Should Vacate the Ninth Circuit's Opinion as Moot

In *University of Texas v. Camenisch*, 451 U.S. 390 (1981), this Court granted a petition for a writ of certiorari and vacated the opinion of the court below as moot. The case was found to be moot because petitioners had completely complied with the requirements of the preliminary injunction being challenged. In this case, no injunction remained in effect for Respondents to obey. The case is moot because any actions which might have been enjoined have already been taken.

If Petitioners are granted a writ of certiorari in this case, the most appropriate result would be for this Court to vacate the opinion below as moot. The Ninth Circuit's opinions in this case have failed to offer to the parties any final and authoritative resolution of the dispute. Instead, the court has gone from remanding the case to the District Court, to dismissing it as moot, to holding that it is not moot, and that Petitioners should prevail, but that no remedy is possible. Where no remedy is available, the case *is* moot. *Mills v. Green*, 159 U.S. 651, 653; *Hall v. Beals*, 396

U.S. 45, 48. By vacating the Ninth Circuit's opinion on grounds of mootness, this Court could finally lay to rest the fruitless argumentation that has characterized this case.

CONCLUSION

For the foregoing reasons, appellants' Petition for a Writ of Certiorari should not be granted. If the Writ is granted, the decision of the Court of Appeals for the Ninth Circuit should be vacated as moot and remanded.

Dated: July 6, 1989

Respectfully submitted,

JAMES R. WHEATON
ARMANDO M. MENOCAL III
Public Advocates
Attorneys for Intervenors
Officers for Justice, et al.